Nos. 90-1262, 90-1266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF ARKANSAS, *et al.*,
Petitioners,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF OF THE STATES OF NEVADA, NEW HAMPSHIRE, NORTH DAKOTA AND SOUTH DAKOTA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

FRANKIE SUE DEL PAPA
Attorney General
STATE OF NEVADA
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710

NICHOLAS J. SPAETH
Attorney General
(Counsel of Record)
STATE OF NORTH DAKOTA
State Office Building
900 East Boulevard
Bismarck, North Dakota 58505
(701) 224-3640

Date: May 31, 1991

(Additional Counsel Listed On Inside Front Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

JOHN P. ARNOLD
Attorney General
STATE OF NEW HAMPSHIRE
25 Capitol Street
Concord, New Hampshire 03301

MARK BARNETT
Attorney General
STATE OF SOUTH DAKOTA
500 East Capitol
Pierre, South Dakota
57501-5070

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1262

STATE OF ARKANSAS, *et al.*,
Petitioners,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

No. 90-1266

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF OF THE STATES OF NEVADA, NEW HAMPSHIRE, NORTH DAKOTA AND SOUTH DAKOTA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

The States of Nevada, New Hampshire, North Dakota and South Dakota respectfully submit thise brief as *amici curiae* in support of petitioners and urge this Court to

reverse the decision by the United States Court of Appeals for the Tenth Circuit in *Oklahoma* v. *EPA*, 908 F.2d 595 (10th Cir. 1990).[1]

INTEREST OF THE AMICI CURIAE

The statute at issue in this case, commonly known as the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, establishes the framework now used for regulating water quality on all of the nation's waterways. The waterways affected by this statutory scheme include thousands of rivers and streams that at one point or another cross a state boundary, as well as countless other rivers and streams that are tributaries of interstate rivers or lakes. The vast majority of the rivers, streams and even creeks running through the Amici States are thus subject to the provisions of the Clean Water Act that govern discharges into interstate waterways.

As enacted by Congress in 1972, Section 303 of the Clean Water Act calls upon each individual state to establish water quality standards for the waters within that state. 33 U.S.C. § 1313. In addition, the Act created a new permitting system, and any "point source" that intends to discharge effluent into a state's waters must obtain a permit under this National Pollutant Discharge Elimination System ("NPDES"). CWA § 402, 33 U.S.C. § 1342. One condition for receiving an NPDES permit is that the discharge from a facility must meet national technology-based effluent limitations set by EPA. CWA § 301, 33 U.S.C. § 1311. Another condition is that the discharge must comply with the water quality standards set by the state in which the source facility is located. CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C).

---

[1] This brief is submitted on behalf of the Amici States by their respective Attorneys General. Pursuant to Supreme Court Rule 37.5, the consent of the parties to the filing of this brief is not required.

Pursuant to Sections 303 and 304(a), the water quality standards set by each state must meet federal criteria that EPA publishes and periodically updates, unless a state demonstrates that less stringent standards are warranted by other economic or environmental considerations. 33 U.S.C. §§ 1313, 1314(a). *See also* 40 C.F.R. § 131.10 (g)(6). Accordingly, states must submit their standards for approval by EPA, *i.e.*, for review to assure that they meet the federal minimum requirements, and states must review their standards every three years for this purpose. In recognition that some states might want to adopt stricter standards, however, the general savings clause enacted as Section 510 preserves the right of individual states to establish water quality standards under state law that are *more* stringent than the federal minimum requirements. 33 U.S.C. § 1370.

The Amici States have a vital interest in this case because the Tenth Circuit's decision threatens to render this statutory scheme unworkable and to create unnecessary conflicts among the states. In particular, the Tenth Circuit held that whenever a downstream state has adopted a more stringent or otherwise different standard for any segment of a waterway passing through that state, the Clean Water Act requires sources in upstream states to comply with the downstream state standards, in addition to the standards of their own state. Ark. Pet. App. at 43a. As a result, both public and private facilities will become subject automatically to the most stringent standards and to every varying standard along an interstate waterway, regardless of conditions in the source state.[2] Moreover, the Tenth Circuit held

---

[2] In the agency proceeding under review, EPA had issued an NPDES discharge permit for a new, state-of-the-art sewage treatment plant built by the City of Fayetteville, Arkansas. Under the terms of that permit, half of the facility's effluent would flow into a river that crosses into the State of Oklahoma about forty miles downstream from the point of discharge. EPA had approved the

that the agency considering a permit application (here EPA) lacks any authority under the CWA to interpret, temper, or deviate in any way from the water quality standards of the downstream state. *Id.* at 33a. Indeed, the court held that no permit could issue in this case even though it did not disturb EPA's finding that the proposed discharge would have no detectable effect on the downstream state's water quality. *Id.* at 78a.

In addition to compelling a rigid application of downstream state standards, the Tenth Circuit held that any pre-existing violation of a relevant water quality standard—in either the source state or a downstream state—triggers a mandatory ban on new permits for upstream facilities. *Id.* at 44a. This permit ban would apply to any new upstream facility that proposed to discharge effluent of the type associated with a downstream violation, provided that *some* amount of the effluent, even if undetectable, would reach the downstream segment. *Id.* at 79a-80a. Under the Tenth Circuit's view, permitting agencies are bound to enforce this ban immediately, regardless of the conditions causing a violation or other alternatives for remedying the violation.

The Amici States are all deeply committed to the goals of improving water quality. The rigid and unprecedented approach mandated by the Tenth Circuit, however, would eliminate the flexibility that is essential for individual states to achieve those improvements while also serving the other needs of their citizens. Since the vast majority of public and private facilities must discharge into waterways that eventually reach a downstream state, the Tenth Circuit's decision would affect the wastewater treatment plants owned or operated by nearly every major municipality in the nation, as well as the facilities owned by

---

permit based on a finding that this discharge would fully comply with the water quality standards of Arkansas and would have no adverse impact on water quality in Oklahoma. Ark. Pet. App. at 151a.

states themselves and other public entities. The Tenth Circuit's approach would also threaten the permitting for all new industrial facilities locating in these states and the permit renewals of existing businesses.

Under the Tenth Circuit's approach, the permitting for all of these facilities would become absolutely dependent on the political choices made by downstream states, regardless of the interests of the upstream state. Downstream states may elect in many instances to adopt stricter standards for some segments of a waterway, perhaps even precluding altogether any new discharges because the adjacent area is sparsely populated or the facilities in that state can discharge into alternative waterways. The Clean Water Act, of course, allows downstream states to make this choice. But segments of that same waterway or its tributaries in an upstream state may pass through more densely populated areas, and the upstream state may accommodate the needs of those areas by setting standards that do allow controlled discharges from appropriate sources.

The Tenth Circuit's construction of the Clean Water Act, however, eliminates the upstream state's ability to make these judgments. Instead, the citizens and facilities of the upstream state are bound rigidly to the decisions made by the downstream state, even though they have no say in making those decisions and the downstream states have no obligation to consider the impact of their decisions on upstream states. This extreme interpretation undermines the responsibility entrusted by the Act to upstream states, eliminates the discretion needed for making permit decisions, and destroys accountability in the standard-setting and permitting processes. Even worse, the Tenth Circuit's one-sided approach removes any incentive for downstream states to negotiate or compromise with upstream states, and it creates instead a system that will encourage economic warfare and retaliaiton among the states.

The Tenth Circuit's imposition of a mandatory permit ban for waterways with pre-existing violations similarly interferes with the responsibility granted to the states and permitting agencies. The Clean Water Act contemplates a progressive approach to the improvement of water quality, which allows individual states to establish priorities and allocate the burden of discharge reductions. The Tenth Circuit's absolute and immediate ban conflicts with the fundamental basis and structure of this regulatory scheme and calls into doubt the availability of permits for countless new public and private projects. Moreover, the court's holding will create intolerable burdens for the states that have implemented EPA-approved programs for issuing NPDES permits to sources within their jurisdiction. CWA § 402(b), 33 U.S.C. § 1342(b). In addition to the responsibility for evaluating compliance with their own state standards, the permitting agencies presumably would be obligated to obtain and consider data regarding the existence of violations on every downstream segment of a waterway, even though such assessments have not been completed on a majority of the nation's waterways.

For all these reasons, the Amici States have a compelling interest in the issues presented by this case and respectfully urge this Court to reverse the decision of the Tenth Circuit.

SUMMARY OF THE ARGUMENT

By compelling permitting agencies to impose on all public and private facilities the water quality standards of each downstream state, and leaving no flexibility for interpreting or applying those standards, the Tenth Circuit's decision upsets the balance struck by Congress in the Clean Water Act among the permitting agencies, the source states, and downstream states. In effect, the decision deprives both EPA and state permitting agencies of the discretion to balance the competing interests of the states, by determining whether a discharge would have an undue impact on downstream waters. It also allows downstream states to do indirectly what they may not do directly—force their own water quality standards on a point source in an upstream state. *See infra* Section I.

As shown below, the statutory structure created by Congress makes each individual state responsible for setting the water quality standards on its own waterways. For subsequent permitting decisions, the statute then requires EPA and state permitting agencies to consider the interests of all states affected by a new source and its discharge. *See infra* Section I.A. But the statute does not make downstream state standards absolutely controlling, because that would eliminate the responsibility of other states and undermine the ability to consider *all* relevant factors in the permitting process. *See infra* Sections I.B., I.C.

The Tenth Circuit's admittedly novel conclusion that pre-existing water quality violations mandate imposing an immediate ban on new discharges is similarly unsupported by the language of the Clean Water Act and its legislative history. *See infra* Section II. No other court has construed the Act in this manner in the almost twenty years since its enactment, and the Tenth Circuit's interpretation would conflict with the procedures Congress specifically created for bringing all waterways into compliance with applicable water quality standards.

ARGUMENT

I. THE CLEAN WATER ACT DOES NOT REQUIRE A SOURCE IN ONE STATE TO COMPLY STRICTLY WITH THE STANDARDS OF DOWNSTREAM STATES.

Congress intended when it enacted the Clean Water Act to maintain the sovereignty of each state over its own waters, subject to federal review and coordination. Thus, while the CWA does impose certain minimum federal requirements on states, Section 101(b) of the Act specifically declares that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). By construing the Act in a manner that allows one state to impose its standards on another, the Tenth Circuit's decision undermines this fundamental principle of state sovereignty.

A. The Clean Water Act Preserves The Right Of States To Adopt Stricter Standards That Apply To In-State, But Not Out-Of-State, Sources.

The statutory language, the overall structure of the Clean Water Act, and generally recognized principles of state sovereignty all demonstrate that Congress did not authorize downstream states to impose the water quality standards adopted for their own waters on sources in upstream states. Each state's water quality standards are intimately connected to the local economic, industrial, municipal, agricultural and recreational activities of that state. Recognizing the essentially local character of water quality policies, Congress preserved each state's prerogative to establish the standards that would apply to waterways *within* the state. This preservation of standards adopted pursuant to state law allows the individual states, most familiar with local conditions and problems,

to balance competing uses and determine priorities for their waters.[3]

Congress was concerned, however, that if states had absolute authority to regulate their own waters, some states might enact insufficiently stringent water quality standards in order to attract industry and encourage economic growth. Such "pollution havens" would be especially troublesome if they were located in upstream states, leaving little incentive or opportunity for downstream states to clean up their own waters.[4]

To minimize the problems that might be created by the adoption of inconsistent standards in neighboring states, Congress required the states to obtain federal approval of ambient water quality standards. CWA § 303(c), 33 U.S.C. § 1313(c). In reviewing each new or revised state standard, EPA was directed to ensure that such standards meet the minimum federal requirements of the CWA. *Id.*[5] If EPA disapproves a state standard because it does not meet the federal requirements, and the state subsequently fails to promulgate a revised standard within the prescribed time limits, EPA is required to issue a federal standard. *Id.* This requirement that every state adopt and enforce federally-approved standards was

---

[3] In amending an earlier version of the Clean Water Act in 1965 to require states to adopt water quality standards, Congress recognized that states should have primary responsibility for setting water quality standards because of their familiarity with local conditions. *See, e.g.*, 111 Cong. Rec. 8665 (1965) (statement of Rep. Harsha) ("Standards of water quality . . . should be established by the State and local agencies which are most familiar with the matter in a given locality, such as the economic impact of establishing and enforcing stringent standards of water quality.").

[4] *See, e.g.*, 111 Cong. Rec. 8671 (1965) (statement of Rep. Ottinger); 111 Cong. Rec. 8678 (1965) (statement of Rep. Dwyer).

[5] The statute requires EPA to develop and publish water quality criteria to provide guidance to states in promulgating their standards. CWA 304(a), 33 U.S.C. § 1314(a).

intended "to insure uniform water quality standards across the Nation." [6]

Also in deference to the principles of state responsibility and sovereignty, a "savings clause" in the Clean Water Act preserves the right of states to promulgate stricter standards than those necessary to meet federal requirements. CWA § 510(1), 33 U.S.C. § 1370(1). Most interstate disputes over water quality arise when a downstream state exercises this right and chooses to adopt a stricter standard under Section 510.[7] Once the downstream state promulgates a more stringent standard than the states upstream, an inherent tension develops between the water quality policies of the adjoining states. This conflict becomes manifest if the upstream state plans to approve an NPDES permit that complies with its own federally-approved water quality standards, but may not meet the stricter standards of a downstream state.

Because of prior interstate controversies, Congress was aware of the potential for such conflicts between states when it enacted the CWA. Accordingly, in seeking to balance the interests of upstream and downstream states, Congress provided several mechanisms to protect downstream states from unreasonable degradation of their water quality by sources in upstream states. Among these mechanisms, Congress required permitting agencies to consider the views of downstream states regarding

[6] *See* 118 Cong. Rec. 10,795 (Mar. 29, 1972) (statement of Rep. Robison), *reprinted in* 1 Senate Comm. on Public Works, 93d Cong., 1st Sess., Legislative History of the Water Pollution Control Act Amendmtnts of 1972, at 727 (1973) [hereinafter Leg. Hist. of 1972]. *See also* 111 Cong. Rec. 8678 (1965) (statement of Rep. Dwyer).

[7] Although most waterways flow through more than one state, few water quality disputes would be expected if adjacent states adopt identical standards based on the federal criteria. In fact, many states do base at least some of their water quality standards on the federal criteria, frequently resulting in uniform state standards. *See* 2 W. Rodgers, *Environmental Law: Air and Water* 247 (1986).

the impact of a new source on their water quality, and Congress anticipated that permitting agencies would place additional restrictions on those sources as warranted in specific cases.[8]

In conjunction with these provisions requiring case-by-case determinations, Congress also gave EPA the power to veto state-issued permits that do not adequately protect the water of downstream states, thereby establishing EPA as the federal mediator of interstate water quality disputes. CWA § 402(d)(2), 33 U.S.C. § 1342(d)(2). Consistent with the statutory goal of preserving state sovereignty, however, the statutory provisions creating these mechanisms did *not* make the downstream standards automatically applicable to the upstream sources, and Congress provided no other authority for one state to impose its water quality standards on sources in another state.

Both this Court and lower federal courts have recognized this Congressional balance and limitation on the applicability of state water quality standards. Specifically, Section 510 has been interpreted as limiting the applicability of the stricter standards one state may adopt to sources within that state's own borders.[9] Accordingly,

[8] CWA § 402(b)(5), 33 U.S.C. § 1342(b)(5); CWA § 402(a)(3); 33 U.S.C. § 1342(a)(3); CWA § 401(a)(2), 33 U.S.C. § 1341(a)(2). Congress also required all dischargers to meet uniform national technology-based effluent limitations, which in most cases will adequately protect downstream water quality. CWA § 301(b), 33 U.S.C. § 1311(b). In addition, federal approval of state water quality standards will ensure that acceptable water quality is achieved in all states. CWA § 303(c), 33 U.S.C. § 1313(c). Finally, Congress authorized the Governor of a downstream state that is adversely affected by a discharge in an upstream state to bring a civil action against the Administrator when the source causing the problem is operating in violation of its permit conditions. CWA § 505(h), 33 U.S.C. § 1365(h).

[9] *See, e.g., City of Milwaukee* v. *Illinois*, 451 U.S. 304, 328 (1981) (under Section 510, "[s]tates may adopt more stringent limitations

Section 510 simply preserves the historic right of a state to adopt and apply stricter standards under its own state law. "Congress thus has chosen not to preempt state regulation when the state has decided to force *its* industry to create new and more effective pollution-control technology." *United States Steel Corp.* v. *Train*, 556 F.2d 822, 830 (7th Cir. 1977) (emphasis added).

The preservation of sovereign state rights in Section 510, therefore, certainly evinces no Congressional intent to give more stringent standards adopted under state law a federal imprimatur that would allow them to be applied extra-territorially against sources in other states. Indeed, such an application of one state's law to override the law in another state would contradict the very purpose of Section 510 to preserve the jurisdiction of each state over its own waters and dischargers.[10] Thus, the section of the Act that specifically allows states to adopt more stringent standards also limits the application of such standards to sources within a state's own borders.

B. The Extra-Territorial Application Of Downstream State Law Is Inconsistent With Congress' Intent, Constitutional Limitations, And Our Federal System.

The Tenth Circuit's holding that a downstream state's stricter standards apply automatically to sources in upstream states would subvert the statutory scheme that Congress enacted. As shown above, Congress intended in

through state administrative processes . . . and apply them to *in-state* dischargers") (emphasis added); *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 493 (1987) (more stringent state standards adopted under Section 510 can only be applied "to discharges flowing *directly* into a State's own waters, *i.e.*, discharges from within the State") (emphasis in original).

[10] "[N]othing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." CWA § 510, 33 U.S.C. § 1370.

Section 402 of the Act that the permitting agency, whether EPA or the source state, would consider and, if appropriate, impose more stringent standards to protect downstream water quality. But as this Court has stated:

> [A]n affected State does not have the authority to block the issuance of the permit if it is dissatisfied with the proposed standards. An affected State's only recourse is to apply to the EPA Administrator, who then has the *discretion* to disapprove the permit if he concludes that the discharges will have an *undue impact* on interstate waters.

International Paper Co. v. *Ouellette*, 479 U.S. 481, 490-91 (1987) (emphasis added).

This Court's construction in *Ouellette* of the CWA's interstate provisions is further supported by two additional considerations. First, state water quality standards remain *state* law, even after federal approval. The court of appeals apparently overlooked this fact and based its holding, requiring out-of-state sources to strictly comply with the water quality standards of downstream states, on the assumption that EPA approval automatically transformed the state standards into *federal* law. Ark Pet. App. at 13a-14a. However, EPA review merely ensures that state standards meet the federal criteria; the agency has no power to disapprove the more stringent standards allowed by Section 510 for intrastate purposes. *Homestake Mining Co.* v. *EPA*, 477 F. Supp. 1279, 1284 (D.S.D. 1979).[11] Since EPA approval of a more stringent

[11] In a recent rulemaking, EPA described its policy as follows: "Pursuant to section 510, States have adopted water quality standards more stringent than EPA may consider necessary or appropriate. EPA has taken the position that the Agency is not authorized to disapprove a State water quality standard on the basis that EPA considers the standard to be too stringent." 54 Fed. Reg. 39,099 (1989).

state standard is perfunctory, such approval does not "federalize" the standard.[12]

EPA's General Counsel confirmed this conclusion regarding the actual status of state standards in a 1977 Opinion issued specifically to address the consequences of revisions to those standards. Based upon the structure of the Act, the General Counsel concluded that such standards "remain exclusively State standards" even after federal approval.[13] The General Counsel further explained that:

> EPA's approval only acknowledges the adequacy of the State standards and indicates that promulgation of Federal standards is not required. It does not create a Federal standard which has an existence independent of the State standard.[14]

As part of EPA's reasoning, the Opinion emphasized that unlike a state implementation plan adopted under the Clean Air Act, which does become a federal standard when approved by EPA, a state water quality standard is not approved by notice and comment rulemaking and is not directly enforceable.[15]

---

[12] *United States Steel Corp.* v. *Train*, 556 F.2d 822, 837 (7th Cir. 1977) ("the standards are state, not federal regulations").

[13] EPA General Counsel, Memorandum: Revision of Water Quality Standards and Implementation Plans Under § 303 of the Federal Water Pollution Control Act (Feb. 3, 1975), *incorporated in* In Re Bethlehem Steel Corporation, General Counsel Op. No. 58 (Mar. 29, 1977).

[14] *Id.* Similarly, the Conference Report for the 1972 CWA Amendments clearly reflects Congress' understanding that more stringent state standards adopted under Section 510 would constitute state law and not be part of the federal CWA program. S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 331 (1971), *reprinted in* 1 Leg. Hist. of 1972, at 281, 331 ("Section 510 provides that States . . . retain the right to set more restrictive standards and limitations than those *imposed under this Act.*") (emphasis added).

[15] EPA General Counsel, *supra* note 13.

A second consideration reinforcing this Court's interpretation of the CWA in *Ouellette* is the principle that a federal statute should not lightly be construed as giving one state the extraordinary power to control conduct in an adjoining state. The use of state law by one state to regulate industry and municipalities in another state is inimical to our federal system.[16] This Court has therefore long recognized the "cardinal rule" that one state cannot regulate another:

> [No] state can legislate for, or impose its own policy upon the other. . . . One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none.[17]

Following this principle, the Supreme Court has consistently invalidated under the Commerce Clause state laws that have the "practical effect" of regulating conduct beyond the boundaries of the state, regardless of the intent of the regulation. *See, e.g., Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 775 (1945). The extension of one state's law to regulate entities in another state would "offend sister States and exceed the inherent limits of the

---

[16] Even the Tenth Circuit recognized this well-established principle: "We do not suggest one state may directly regulate the conduct of a discharger in another state. Such exercise of jurisdiction would exceed traditional bounds of sovereignty." Ark. Pet. App. at 22a n.9. The court nevertheless believed that this principle was not violated in the instant case, based on its mistaken assumption that EPA's rubber-stamp approval of a state water quality standard transformed that standard into federal law. *Id.*

[17] *Kansas* v. *Colorado*, 206 U.S. 46, 95-98 (1907). *See also Shaffer* v. *Heitner*, 433 U.S. 186, 197 (1977), quoting *Pennoyer* v. *Neff*, 95 U.S. 714, 722 (1877) (two important principles of interstate relations are "that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory . . . [and] that no state can exercise direct jurisdiction and authority over persons and property without its territory").

State's power." *Shaffer* v. *Heitner*, 433 U.S. at 197. Moreover, the extra-territorial application of state law is objectionable because "[u]nrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States." *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82, 92 (1984).

Congress, of course, may exercise its own power under the Commerce Clause and allow states to adopt regulations that would otherwise exceed the limitations imposed by that Clause. But to do so, and thereby sanction state regulations that would have extra-territorial effect, this Court has held that Congress must express its intent with unmistakable clarity:

> [F]or a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be *unmistakably clear*. The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine. It is not . . . merely a wooden formalism.

Wunnicke, 467 U.S. at 91-92 (emphasis added). *See also Sporhase* v. *Nebraska*, 458 U.S. 941, 960 (1982).

Congress certainly did not express such a clear intent in the CWA. No provision in the Act expressly authorizes one state to impose its water quality standards on out-of-state sources. Nor is there any evidence that Congress intended to cause the same result—without expressly saying so—either by allowing one state to set the applicable standards for another's facilities or by requiring permitting agencies to blindly follow a downstream state's standards when approving a permit for an upstream source. To the contrary, the language and structure of the CWA demonstrate that Congress intended to maintain the traditional sovereign roles of each state over its own waters and sources.[18]

[18] *See Ouellette*, 479 U.S. at 487 ("We hold that when a court considers a state-law claim concerning interstate water pollution that is subject to the CWA, the court must apply the law of the State in which the point source is located."); *id.* at 494 ("we conclude that the CWA precludes a court from applying the law of an affected State against an out-of-state source").

The legislative history is thus devoid of any evidence, much less "unmistakably clear" evidence, that Congress affirmatively intended for state standards to apply extra-territorially. In fact, in the statutory provisions where Congress specifically addressed the issue of interstate water quality disputes and the potential for inconsistent state standards, Congress established the notice and hearing procedure of Section 402(b)(5). This provision plainly gives permitting agencies the *discretion* to consider downstream standards and impose more stringent limitations on a case-by-case basis. *See Ouellette*, 479 U.S. at 490-91; Ark. Pet, at 14-16. Similarly, Congress gave EPA the discretion to veto state-issued permits that did not adequately protect downstream water quality, and unambiguously decided *against requiring* EPA to veto every permit that failed to comply with the water quality standards of downstream states. CWA § 402(d)(2), 33 U.S.C. § 1342(d)(2).[19]

Given the statutory and constitutional restrictions on the power of states to regulate beyond their own borders, the CWA cannot be interpreted as requiring sources in upstream states to comply automatically with a down-

[19] The decision by a source state permitting agency to require facilities within its jurisdiction to satisfy a downstream state's standards obviously does not present the same concerns under the Commerce Clause. Nor would a case-by-case determination by EPA, as the permitting or reviewing agency, to impose additional permit conditions in light of a downstream state's standards or concerns. If EPA decided instead, however, to adopt a blanket rule that automatically required sources in upstream states to comply rigidly with the standards of downstream states, EPA's rule would be constitutionally suspect. Only Congress has the power to "sanction" state regulation that would otherwise violate the Commerce Clause. Moreover, such a rule would constitute an abdication of the responsibility Congress assigned EPA to consider downstream state standards on a case-by-case basis.

stream state's standards. The court of appeals' decision is thus fundamentally inconsistent with the structure of our federal system and the regulatory scheme established by Congress in the CWA. A very clear expression of Congressional intent should be required before authorizing one state to impose its state law standards on another sovereign state. Absent such a clear expression, the Act cannot be given the construction adopted by the Tenth Circuit.

C. The Practical Consequences Of The Tenth Circuit's Holding Confirm That Congress Did Not Intend State Standards To Apply Extra-Territorially.

The Tenth Circuit's construction of the CWA, unless overturned, will severely interfere with the NPDES permitting process and will impose extraordinary burdens on states. These consequences further confirm that Congress could not have intended the rule adopted by the court of appeals. Most fundamentally, the decision will disrupt the careful weighing and integration of socio-economic and environmental considerations that Congress intended to underlie th[illegible]blishment of water quality standards.[20] A downstre[illegible]ate that could impose its standards on an out-of-st[illegible]rce would have no incentive, or indeed even the capability, to consider the legitimate socio-economic interests and needs of upstream communities and industries.

While the Amici States in no way mean to suggest that pollution should be tolerated just because it is expensive to eliminate, Cong[illegible]ess did clearly intend for states to consider the burdens imposed on municipalities and businesses as relevant factors in the standard-setting process.[21] A state will normally have the appropriate incen-

[20] *See, e.g.*, 117 Cong. Rec. 38,805 (Nov. 2, 1971) (statement of Sen. Randolph), *reprinted in* 2 Leg. Hist. of 1972, at 1272. *See also* EPA, Water Quality Standards Regulation, 48 Fed. Reg. 51,400 (1983).

[21] *See Ouellette*, 479 U.S. at 494.

tives to accommodate the interests of sources within its own borders, but has no similar incentive to consider, and hence is likely to disregard, the economic impact of its standards on out-of-state municipalities and industries.[22] Thus, the Tenth Circuit's decision, besides being contrary to the CWA, would frequently result in the unfair and unreasonable application of downstream standards to out-of-state sources.[23] The nationwide application of the decision below would therefore dramatically increase water quality conflicts and "economic warfare" between the states.[24]

By allowing two or more states to impose separate discharge standards on a single point source, the Tenth Circuit's construction of the Act will also create immense practical problems. Prior to the decision below, state agencies normally based permit approvals on a facility's compliance with the water quality standards of the source

[22] Furthermore, out-of-state sources required to comply with a downstream state's standards will be deprived of the other safeguards provided by the CWA to ensure that water quality standards do not impose unreasonable burdens. For example, states are authorized to relax water quality standards that "would result in substantial and widespread economic and social impact." 40 C.F.R. § 131.10(g)(6). A downstream state is unlikely to implement such a safeguard to protect the economic viability of out-of-state communities.

[23] EPA will have no authority to prevent such unfair and unreasonable consequences. The agency has no power to disapprove the *adoption* of a state standard on the grounds that it is unreasonably stringent or will unjustly impact sources in other states. *See supra* p. 13. Under the Tenth Circuit's holding, EPA also lacks the discretion to consider the fairness and reasonableness of *applying* a downstream standard in each particular circumstance.

[24] The Tenth Circuit's holding also creates the opportunity for some states to intentionally discriminate against sources in adjacent states by adopting stringent water quality standards at their upstream borders, while establishing lower standards on the same waterways through the remainder of the state.

state only, in accordance with the existing case law.[25] The Tenth Circuit's interpretation, however, would require permitting agencies in source states to identify, interpret and apply the relevant standards of all downstream states potentially affected by a proposed discharge. This requirement would overwhelm the state agencies in upstream states, whose staff would now be obliged constantly to monitor and review the standards of downstream states,[26] and could not possibly have been intended by Congress. Moreover, because the imposition of a downstream state's standards could have such severe consequences for a state's economic growth and prosperity, upstream states would often be compelled to participate every time each downstream state revises or sets new water quality standards, assuming the upstream states would be able to receive timely notice of such standard-setting proceedings.[27]

---

[25] *See, e.g., Ouellette*, 479 U.S. at 481 (1987); *Illinois* v. *City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985); *State* v. *Champion Int'l Corp.*, 709 S.W.2d 569 (Tenn. 1986), *cert. granted and remanded*, 479 U.S. 1061 (1987).

[26] Public and private point source dischargers within the Amici States will also be adversely affected by the decision of the court of appeals. Existing facilities have been constructed, and new facilities have been planned, based on compliance with the water quality standards of the source state. Many facilities may now be required to achieve stricter effluent limitations to meet the standards of downstream states. Such changes may involve expensive retrofitting or remodeling of facilities and the disruption of business operations and municipal sewer service.

[27] As this Court previously recognized in *Ouellette*, the CWA's notice provisions regarding interstate waterways further demonstrate that Congress could not have intended a downstream state's standards to apply automatically to sources in an upstream state. 479 U.S. at 495 n.15. The Act generally requires notice and an opportunity to participate for any entity that would potentially be affected by a proposed regulation. Significantly, the Act does not require downstream states to notify upstream states of their new or revised water quality standards, suggesting that Congress did not expect such standards would automatically apply to sources in upstream states. In contrast, an upstream state is required to notify and consider recommendations from downstream states whose water quality may be affected by a proposed permit in the upstream state. CWA § 402(b)(5), 33 U.S.C. § 1342(b)(5); CWA § 401(a)(2), 33 U.S.C. § 1341(a)(2). These notice provisions confirm that Congress intended the permitting agency in the source state, and not a downstream state, to determine the applicable standards for discharges into an interstate waterway.

The potential for confusion and resulting interstate disputes would grow exponentially as each state is required to interpret and apply the standards of other states.[28] The disruptive consequences of the Tenth Circuit's rule would be further compounded by the 1987 CWA amendment that authorizes EPA to treat Indian tribes as states under the Act. CWA § 518, 33 U.S.C. § 1377. This new provision would vastly increase the number of different standards that may apply to a single discharge under the Tenth Circuit's interpretation of the statute. The inevitable consequence would be even more conflicts, and more unreasonable and unfair extra-territorial applications of standards to sources in other jurisdictions.[29]

---

[28] For example, each of the numerous states on the Mississippi River could adopt its own standard for a particular persistent pollutant. A permitting agency in a state near the river's origin would thus be required to interpret and apply the standards of as many as eight or nine downstream states. Alternatively, a state near the mouth of the river may have its standards interpreted and applied by as many as eight or nine upstream states. In fact, the situation could be even more complicated, because each state could adopt more than one standard for the different segments of a particular waterway within its borders. On almost any major interstate waterway in the United States, the Tenth Circuit's decision will create a confusing tangle of inconsistent and overlapping standards, each of which may be subject to several conflicting interpretations.

[29] In fact, the legislative history of the 1987 amendments shows that Congress did not intend to authorize either a state or an Indian tribe to apply its standards extra-territorially. The understanding of Congress was that "there is nothing in the existing Act or in the proposed amendments which gives EPA the power to force one

The Tenth Circuit's interpretation of the Act as requiring out-of-state sources to comply with the water quality standards of each and every downstream state will create massive confusion and economic disruption across the country. It is inconceivable that Congress would have intended to enact a statutory scheme having such sweeping repercussions, especially without clearly articulating its intent and making those requirements explicit in the statutory provisions. Rather, Congress sought to maximize the efficiency and predictability of the permit system it enacted, by establishing "clear and identifiable" discharge standards.[30]

D. The Tenth Circuit's Treatment of Downstream State Standards Was Based On A Flawed Construction Of The Clean Water Act.

From the analysis presented above, it is clear that the court of appeals' treatment of downstream state water quality standards in this case was based on a flawed construction of the CWA. Downstream state standards do not apply of their own force in the permit decisions for upstream facilities. Instead, permit agencies must decide as a matter of discretion whether to impose conditions that will satisfy all or part of the concerns raised by the downstream state and reflected in its standards.

In cases where the downstream state standards are stricter than the federal minimum requirements, pursuant to Section 510 of the Act, the preceding discussion demonstrates that Congress generally expected these standards would be controlling only for in-state sources. To be sure, Congress still directed EPA (and state permitting agencies) to consider these standards in granting permits for upstream sources and to determine whether they warranted imposing additional effluent limitations. EPA did that here, and the agency concluded that no additional permit limitations were needed, in light of the downstream standards, to protect Oklahoma's water quality. Absent a clear abuse of the agency's discretion in making this determination, a reviewing court should not upset the agency's permit decision, and the Tenth Circuit gave no basis for finding an abuse of discretion, apart from the court's mistaken conclusion that the downstream standards were directly applicable.

On the other hand, in reviewing an agency's permit decision concerning downstream standards intended to meet federal minimum requirements, courts must recognize that EPA was responsible for establishing the federal requirements. EPA therefore has special expertise for interpreting those standards, on a nationwide basis, and is most familiar with the scope and content of those requirements. Consequently, EPA's interpretation of those standards in the context of a permit decision, and the agency's determination that a particular discharge will not violate these requirements, must be afforded substantial weight by a reviewing court. The Tenth Circuit erred here by expressly declining to afford EPA any deference on these matters, in addition to the errors in statutory construction addressed above.[31]

---

state to changes [sic] its approved water quality standards or those valid activities done in accordance with its plan in order to accommodate the water quality needs of another state or states." 133 Cong. Rec. 1000 (Jan. 8, 1987) (memorandum to Rep. Udall), *reprinted in* 1 Senate Comm. on Env't & Public Works, 100th Cong., 2d Sess., Legislative History of the Water Quality Act of 1987, at 551 (1988) [hereinafter Leg. Hist. of 1987]; 133 Cong. Rec. 1282 (Jan. 14, 1987) (memorandum to Rep. Udall), *reprinted in* 1 Leg. Hist. of 1987, at 395.

[30] *Ouellette*, 479 U.S. at 496 n.16 (quoting S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1971), *reprinted in* 2 Leg. Hist. of 1972, at 1499).

[31] The Court need not decide whether the downstream standard at issue in the present case constitutes a Section 303 standard based on the federal requirements or is instead a Section 510 standard that exceeds the federal requirements, because the court of appeals did not identify any basis for concluding that EPA abused its discretion in either event. Moreover, since EPA found that the proposed

II. THE TENTH CIRCUIT'S PERMIT BAN IS INCONSISTENT WITH THE PLAIN LANGUAGE AND EPA'S ADMINISTRATION OF THE CWA.

The Tenth Circuit's second holding, imposing a ban on all new discharges upstream from a pre-existing violation of a relevant water quality standard, is also a radical departure from the statutory objectives and the current implementation of the CWA. Moreover, this newly discovered ban will deprive states of the flexibility they need to bring degraded waterways into compliance with applicable water quality standards, while at the same time minimizing economic disruption and dislocation.

According to the court of appeals, the "principal flaw" in EPA's decision to issue a permit in this case was the agency's failure to recognize that the purposes embodied in the CWA required imposition of a ban on new discharges upstream from an existing violation of a relevant water quality standard. Ark. Pet. App. at 75a. This ban on new permits even applies to new discharges that will have no detectable effect on downstream water quality. *Id.* at 79a-80a. A new discharge would be prohibited where *any* amount of effluent, even though undetectable, might reach the downstream segment that is experiencing a water quality violation. *Id.* at 82a n.58.

Not only is the imposition of this "implied" ban wholly inappropriate for a reviewing court, but the "remedy" for nonattainment situations chosen by the Tenth Circuit fundamentally conflicts with the plain language of the CWA, as well as Congress' intent and EPA's administra-

---

discharge in the present case would comply with the federal minimum requirements in the downstream state, this Court also need not reach the issue of whether permit agencies have less discretion in cases involving downstream Section 303 standards (based on the federal minimum requirements) or should otherwise be under greater constraints in exercising their discretion to impose limitations on out-of-state sources that would satisfy the Section 303 standards adopted by downstream states.

tion of the Act. A brief consideration of the regulatory scheme that preceded the 1972 CWA Amendments demonstrates the radical departure caused by the court's holding. Prior to 1972, ambient water quality standards were the primary means for regulating water pollution. *See EPA* v. *California ex rel, State Water Resources Control Board*, 426 U.S. 200, 202-03 (1976). State standards designated acceptable ambient levels of pollution allowed in receiving waters. If standards were exceeded, attempts were made to trace pollution violations to individual dischargers.

Because of the complex relationship between effluent discharges and water quality, and the resultant difficulty in linking individual dischargers to particular violations of water quality,[32] the Senate Committee on Public Works concluded in 1972 that this approach had been "inadequate in every vital respect." [33] Thus, the 1972 Amendments shifted the primary focus for controlling water pollution from the quality of the receiving waters to technology-based effluent limitations that apply directly to individual dischargers. CWA § 301(b), 33 U.S.C. § 1311 (b). Each source is now required to comply with the appropriate limitations, irrespective of the quality of the receiving water.

Water quality standards were retained as a supplemental measure, however in the 1972 Amendments, and additional, more stringent limitations could be imposed on dischargers if the technology-based limitations were insufficient to achieve compliance with applicable water quality standards. CWA § 301(b)(1)(C), 33 U.S.C.

---

[32] "In water pollution, the precise amount of effluent a given river can handle without deterioration of water quality depends not only on the amount of effluent emitted, but also on the temperature of the water, the speed at which the water is traveling, the general characteristics of the waterway, the time of the year, and the like." 1 F. Grad. *Treatise on Environmental Law* § 3.03, at 3-101 (1990).

[33] S. Rep. No. 414, 92d Cong., 1st Sess. 7 (1971), *reprinted in* 2 Leg. Hist. of 1972, at 1415, 1425.

§ 1311(b)(1)(C). Nevertheless, Congress unmistakably signalled its intent that water quality standards were to be a secondary mechanism for controlling water pollution when it specifically directed EPA to "assign secondary priority" to enforcing water quality standards.[34] But by fashioning a ban based on pre-existing water quality violations, the Tenth Circuit has effectively supplanted technology-based effluent limitations and reverted to water quality standards as the primary regulatory mechanism for control of pollution. This was the very approach that Congress rejected as unworkable in 1972, and the court's decision is therefore clearly inconsistent with the statutory framework.

Congress was well aware that many of the nation's waterways were severely polluted when it enacted the 1972 Amendments,[35] and the absence of any reference in the statute to imposing a rigid permit ban indicates that Congress deliberately chose not to adopt that approach. Rather, in light of those conditions, Congress chose an incremental approach for achieving acceptable water quality by reducing pollution through the imposition over time of progressively more stringent effluent limitations on new and existing point discharges.[36] Nowhere

[34] 118 Cong. Rec. 33,696 (Oct. 4, 1972) (summary prepared by Sen. Muskie of Conference Report), *reprinted in* 1 Leg. Hist. of 1972, at 171. *See EPA* v. *California ex rel. State Water Resources Control Board*, 426 U.S. 200, 205 n.12 (1976) ("[w]ater quality standards are retained as a supplementary basis for effluent limitations").

[35] S. Rep. No. 414, 92d Cong., 1st Sess. 7 (1971), *reprinted in* 2 Leg. Hist. of 1972, at 1415, 1425.

[36] As originally enacted, the 1972 Amendments required point sources other than publicly owned treatment works to achieve the "best practicable control technology currently available" by July 1, 1977, and the "best available technology economically achievable" by July 1, 1983. Pub. L. No. 92-500, § 2, 86 Stat. 816, 845 (1972). The timetable for achieving the latter standard was subsequently relaxed to March 31, 1989. *See* CWA § 301(b)(2), 33 U.S.C. § 1311(b)(2).

in either the Act or its legislative history is there any suggestion that Congress ever intended to ban new discharges based solely on evidence of pre-existing water quality violations. Thus, not only is there no "explicit imprimatur" for the Tenth Circuit's holding in the CWA, as even the court conceded, Ark. Pet. App. at 81a, but the holding runs counter to the plain language of the statute.

The specific approach Congress enacted in 1972 deals with existing water quality violations pursuant to an entirely different approach than that created by the Tenth Circuit. In particular, states with existing water quality violations are required by Section 303(d) to set maximum daily loads of discharged effluent which will result in the attainment of relevant water quality standards. 33 U.S.C. § 1313(d).[37] Moreover, the Act does not impose on states any fixed timetable for establishing maximum daily loads for all waterways with existing water quality violations. Instead, states may establish maximum daily loads according to the priority they themselves assign their various waterways. In contrast to the Tenth Circuit's approach, new discharges and increased discharges from existing sources would still be allowed, provided they are included in the maximum daily load allocation. 33 U.S.C. § 1313(d). Under this scheme, no one point source is solely penalized for the water quality violations caused by other dischargers.

Furthermore, the Tenth Circuit's ruling would preclude the issuance of permits even where the proposed discharge would have no detectable effect on the downstream water quality of interstate and intrastate waterways. Under the ruling, the mere existence of a water quality violation in and of itself is sufficient to foreclose a new permit, notwithstanding the absence of a measurable effect of the proposed new discharge on the receiving

[37] A maximum daily load is the total quantity of effluent that can be discharged into a waterway per day without exceeding the relevant water quality standards.

waters. Besides having no basis whatsoever in the Act, and being inconsistent with the specific mechanism Congress created for this situation, the novel approach fashioned by the Tenth Circuit would seriously disrupt the administration of the Clean Water Act.

Until now, permitting decisions have generally been based on whether the release of effluent by an individual point source would itself cause violations of water quality standards.[38] Under the Tenth Circuit's new approach, however, permitting agencies will be required to look beyond the impact of the individual source and assess whether every downstream segment of the waterway is in attainment with all applicable water quality standards. This task will be extremely difficult, if not practically impossible, because water quality data is only available for less than one-third of the nation's stream miles.[39] The court's decision will thus necessitate expensive and time-consuming data gathering from all downstream states, information that has not heretofore been collected by permitting agencies or permit applicants.

The Tenth Circuit's ban on new permits, if applied nationwide, will also have significant ramifications for public facilities and economic development in many states. As a result of the numerous existing violations of relevant water quality standards throughout the nation,[40]

---

[38] *See* U.S. General Accounting Office, *Water Pollution: More EPA Action Needed to Improve the Quality of Heavily Polluted Waters* (GAO/RCED-89-38, Jan. 1989). Technically, a point source's compliance with water quality standards is usually measured at the edge of a designated area called a "mixing zone" that allows some dilution of the effluent.

[39] EPA, *National Water Quality Inventory, 1988 Report to Congress* 1 (EPA 440-4-90-003, April 1990). Furthermore, for the 29% of stream miles that have been evaluated, the reliability of the available data is questionable because of the inconsistent and imprecise methods that have often been used to assess water quality. *Id.* at 3.

[40] *Id.* at 1-3.

new permits for wastewater treatment and industrial discharges may be blocked, and economic growth and development will be impaired. New treatment facilities employing state-of-the-art technologies are vastly more efficient than older plants in removing pollutants during the wastewater treatment process. Moreover, under the court's holding, many states and their political subdivisions may be unable to properly dispose of municipal and industrial wastes. Thus, the Tenth Circuit's holding works to the detriment of the public health, safety and welfare—an outcome directly contrary to the purpose and objectives of the Clean Water Act. Restoration of the integrity of the nation's waters will only be hindered by the denial of permits in such circumstances.

During the nineteen years since enactment of the 1972 Clean Water Act Amendments, the Tenth Circuit is the only court to construe the Act to forbid new permits where downstream water quality violations exist.[41] No provision of the Act even hints at, much less mandates, the Tenth Circuit's conclusion that Congress meant to absolutely ban new permits in such circumstances. Furthermore, in its administration of the Act, EPA has never taken the position that the existence of water quality violations alone excludes consideration of other factors and operates to forbid issuance of new discharge permits. The Tenth Circuit's substitution of its unprecedented construction of the statutory provisions is thus an inappropriate judicial intrusion into the administrative process and must be reversed.

---

[41] The factual situation presented in this proceeding is not novel to the courts. For example, an NPDES permit allowing a discharge from a wastewater treatment plant into the heavily polluted Potomac River was contested in *Montgomery Environmental Coalition* v. *Costle*, 646 F.2d 568 (D.C. Cir. 1980). One of the questions raised was whether the effluent limitations contained in the permit were too lax in light of the condition of the receiving waters. Although the fact that the receiving waters were polluted was squarely before the D.C. Circuit, the court did not find that pre-existing violations of water quality standards mandated denial of an NPDES permit.

CONCLUSION

For the foregoing reasons, the Supreme Court should reverse the decision of the Tenth Circuit.

Respectfully submitted,

FRANKIE SUE DEL PAPA
Attorney General
STATE OF NEVADA
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710

NICHOLAS J. SPAETH
Attorney General
(Counsel of Record)
STATE OF NORTH DAKOTA
State Office Building
900 East Boulevard
Bismarck, North Dakota 58505
(701) 224-3640

JOHN P. ARNOLD
Attorney General
STATE OF NEW HAMPSHIRE
25 Capitol Street
Concord, New Hampshire
03301

MARK BARNETT
Attorney General
STATE OF SOUTH DAKOTA
500 East Capitol
Pierre, South Dakota
57501-5070

Date: May 31, 1991